Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

WILLIAM CASEY MCDONALD AND **STEPHANIE MCDONALD**, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, ET AL.,

Petitioners,

- against -

MARVA HAMMONS, INDIVIDUALLY AND AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 9, 1998.

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the United Stated Court of Appeals for the Second Circuit correctly dismiss an appeal as not appealable under 28 USC § 1291 of an interlocutory order appointing a limited purpose guardian ad litem to question minor children who plaintiff parents had also made plaintiffs in an action under 42 USC § 1983 seeking money damages for an investigation into alleged neglect or abuse of the children by the parents? The guardian ad litem was to report to the District Court as to whether there was a potential conflict of interest between the parents and the children so that each should be represented by separate counsel, as sought by motion of defendants.

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CITY RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER STATEMENT OF THE CASE

Petitioners commenced an action under 42 USC § 1983 seeking money damages for an investigation of alleged child abuse or neglect by plaintiff parents of plaintiff minor children. Ruling on a motion by defendants to disqualify counsel from representing both the parents and the four minor children, whose ages ranged from 10 to 2 at the time of the filing of the complaint (JA12)[1], the District Court for the Eastern District of New York (Korman, J.), in a reported opinion, 936 F.Supp. 86. (A 6-12), dated September 11, 1996, modified an order made on June 20, 1996 of the Magistrate Judge, Joan Azrack, directing that a guardian ad litem be appointed to prepare the children for depositions, and depending on the evidence at the depositions, the Court would then further consider whether potential conflict between parents and children warranted each having separate counsel. The District Court judge ruled that a guardian ad litem should be appointed for the limited purposes of questioning minor plaintiff children to determine if their interests potentially conflict with the interests of the plaintiff parents.

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[1] Numbers in parentheses preceded by the letters JA refer to page numbers of the Joint Appendix before the Second Circuit. Numbers in parentheses preceded by the letter A refer to page numbers of the Appendix of the Petition for Certiorari before this Court.

By Summary Order, filed November 10, 1997 (A17-21), the United States Court of Appeals for the Second Circuit dismissed an appeal of the Order of the District Court for want of jurisdiction, as the District Court's order was not a final order subject to appeal or a collateral order appealable pursuant to Cohen v. Beneficial Indus. Loan. Corp., 337 U.S. 541 546 (1949).

MEMORANDUM AND ORDER OF THE DISTRICT COURT

The Memorandum of the District Court sets forth the operative facts. On September 23, 1994, an anonymous phone call was received at the New York City Emergency Children's Services Unit, with the caller alleging that the McDonald children suffered from poor hygiene, two children had bruises, and the mother had been seen hitting one of them. In accordance with New York State and City laws requiring that investigations into allegations of child abuse commence within twenty-four hours of a report, see New York Social Services Law § 424(6), 18 NYCRR 432.2(b)(3)(i), two caseworkers went to plaintiffs' apartment. Mr. McDonald refused to admit the caseworkers to the apartment. The caseworkers summoned police assistance, and eventually Mr. McDonald brought the children to the lobby, permitting the caseworkers to observe them, but did not allow the children to answer any questions, and continued to deny access to the family's apartment. Two days later, when a different caseworker and supervisor sought to continue the investigation and enter the apartment, Mrs. McDonald fled the building with the children and remained in hiding for about a week until this action was commenced, and the parties stipulated that defendants would take no further action with respect to the reported abuse without advance notice to plaintiffs (A6-7).

On the basis of these allegations, plaintiffs claimed a loss of privacy, liberty, fatherly care, and that they suffered "extreme humiliation, pain and suffering, terror, mental anguish and depression" (A8, Memorandum and Order of September 11, 1996, quoting Second Amended

Complaint, par. 74). Plaintiffs sought $5 million, plus punitive damages, attorney fees, and injunctive relief.[2]

As did the Magistrate Judge, the District Court Judge found there was a potential for conflict between the interest of the parents and children. For example, the parents might attempt to influence the children to testify falsely at their respective depositions (A8). The District Court pointed out that a potential conflict of interest existed because "the children are being represented by counsel selected and retained by their parents in a case in which the parents' treatment of their children provides the central backdrop. If the children confided in their attorneys that they had been abused, neglected, or otherwise mistreated, their obligation to effectively represent the interest of the children, not to speak of the obligation to ensure that the children testify truthfully, would require them to advise the children to disclose the abuse, or to take steps to permit disclosure, in order to protect the children from further abuse. This course of action by the attorneys would conflict with the interest of the parents who retained them. Moreover, aside from the potential conflict, if the children have been abused they may not feel comfortable discussing it openly with counsel retained by their parents." (A9).

The District Court held that the potential for conflict existed, and potential conflict was sufficient to warrant judicial action, citing extensively to the ABA Model Code

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[2] The injunctive relief sought for plaintiff and a putative class would require, inter alia, that all child abuse or neglect investigators have a warrant and probable cause to enter plaintiffs' apartment or the apartment of a putative class member (JA25).

of Professional Responsibility, Ethical Consideration (EC) 5-15; stating that where a lawyer is requested to represent multiple clients having potentially differing interests, the lawyer should resolve all doubts against the propriety of the representation (A9-10).

The children were not competent to waive the potential conflict, nor could the parents waive the conflict for them (A10). The District Court stated that "federal courts 'have repeatedly affirmed a court's power to determine that the interests of a child or incompetent will be best represented by a 'next friend', or guardian ad litem and not by an authorized representative such as a parent or general guardian.' Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist., 873 F.2d 25, 30 (2d Cir. 1989); see also Hoffert v. General Motors Corp., 656 F.2d 161, 164 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982). Appointment of a guardian for an infant is justified when a parent 'is unable, unwilling or refuses to act, or has interests which conflict with that of the infant.' Ad Hoc Comm. of Concerned Teachers, 873 F.2d at 30 (emphasis added)." (A10-11).

Modifying the Magistrate Judge's ruling that the guardian ad litem should be appointed to prepare the children for the depositions and to represent them at the depositions, Judge Korman stated (A11):

> ...the better approach would be to separate the conflict determination from the substance of the litigation. The appointment by Magistrate Judge Azrack of a guardian who would have an opportunity to meet and speak with the children, together with appropriate assistance

> and inquiry from the Magistrate Judge, may address the concerns voiced by her without interfering with the parents' choice of counsel at the formal stages of a case in which there may not be persuasive evidence of neglect or abuse.
>
> Because it is not possible to foresee what the result of the foregoing procedure will be, it is neither necessary or appropriate to propose contingent courses of action that the Magistrate Judge may wish to follow. Nevertheless, I do not intend to suggest that she would be precluded from adhering to her original decision if the record provides a basis for concluding that the children should be separately represented at the deposition. Before such action is taken at the behest of the defendants, less intrusive measures should be pursued.

Various implementing orders followed. By Order dated November 25, 1996, Magistrate Judge Azrack appointed Bonnie Rabin, Esq. as guardian ad litem for the minor plaintiffs for purposes of conducting an inquiry into whether the minor plaintiffs require legal counsel separate from the attorney who represents their parents (A14).

By Order dated March 18, 1997 (A15-16), District Judge Gershon, to whom the case had been reassigned, rejected plaintiffs' appeal of the Magistrate Judge's Order of November 25, 1996, because the plaintiffs' appeal "is merely an effort to relitigate before me an issue upon which Judge Korman has already ruled, i.e., whether a guardian

ad litem should be appointed in this action. The November 25, 1996 order does nothing but carry out Judge Korman's ruling on that issue by appointing Ms. Rabin as guardian ad litem. The plaintiffs do not make any argument here as to Ms. Rabin's capacity to fulfill the role of guardian ad litem; they only seek to have me reconsider their arguments that no guardian ad litem be appointed in this action. Accordingly, I hereby affirm Magistrate Judge Azrack's order of November 25, 1996." (A15).

SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In a Summary Order, filed November 10, 1997, the Second Circuit dismissed the appeal for want of jurisdiction, stating (A20-21):

> The plaintiffs' appeal is at most tantamount to an appeal of an order partially disqualifying their attorney from representing them and their children at the same time (the guardian ad litem was appointed in response to the defendants' motion to disqualify. *See id.* [936 F.Supp.] at 87.) Or, given the very limited nature of the appointment, it can also be viewed as one step in the district court's consideration of disqualification. As such, neither Judge Korman's nor Judge Gershon's order is a final order subject to interlocutory appeal.
>
> Plaintiffs argue, to the contrary, that the orders are collateral, and therefore

appealable, pursuant to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Appealable collateral orders are those "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Comm'n,* 115 S.Ct. 1203, 1208 (1995).

The Supreme Court has held that orders disqualifying counsel in civil cases and orders denying motions to disqualify counsel are not collateral (and therefore not subject to interlocutory appeal). In doing this, the High Court noted that the propriety of granting or denying a disqualification motion frequently only becomes clear at the conclusion of the underlying litigation. *See Richardson-Merrell Inc. v. Koller,*, 472 U.S. 424, 440 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981). Because the temporary appointment of the guardian ad litem to determine whether a conflict of interest exists between the McDonald parents and the children was either no more than a partial disqualification, or else a part of the district court's inquiry into whether disqualification was warranted, it is likewise unreviewable at this time. The plaintiffs will have ample opportunity, after a final judgment in this § 1983 action has been rendered, to appeal any and all claims that

their rights were violated by the appointment of the guardian ad litem.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the Second Circuit correctly dismissed the appeal for want of jurisdiction. The appeal concerned only the appointment of a guardian ad litem for the limited purpose of questioning the plaintiff children prior to their depositions to determine if there is potential conflict between the interests of the children and their parents such as to warrant disqualification of Lansner & Kubitschek as joint counsel for both the parents and children and the appointment of a guardian ad litem for the children to serve throughout the proceedings. The challenged order appointing a guardian ad litem for limited purposes obviously did not finally determine the case so as to be appealable under 28 U.S.C. § 1291, as the order did not end the litigation on the merits and leave nothing for the Court to do but execute the judgment. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988). The District Court had not certified an interlocutory appeal under 28 U.S.C. § 1292(b), and the District Court had no legal basis to, was not asked to, and did not, certify an appeal under Rule 54. Plaintiffs have not requested any certification of an appeal by the District Court.

The order appointing a guardian ad litem for limited purposes was not an appealable collateral order which should be treated as final under a "practical construction" of 28 U.S.C. § 1291 pursuant to the Cohen doctrine (Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. 541). See Digital Equipment Corp. v. Desktop Direct, Inc., 511

U.S. 863, 867 (1994). To be an appealable collateral order under 28 U.S.C. § 1291 pursuant to the Cohen doctrine, which is a narrow exception to statutory finality appealability requirements, the order must at a minimum satisfy three conditions: it must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from a final judgment. Swint v. Chambers County Commission, supra, 115 S.Ct. at 1208; Digital Equipment Corp. v. Desktop Direct, Inc., supra, 511 U.S. at 867; Gulfstream Aerospace Corp. v. Mayacamas Corp., supra, 485 U.S. 271, 276; Richardson-Merrell Inc. v. Koller, supra, 472 U.S. at 431-432. The question sought to be reviewed must involve rights too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546; Richardson-Merrell Inc. v. Koller, supra, 472 U.S. at 430.

To the extent plaintiffs-appellants challenge the orders as constricting their right to counsel of their choice, appealability is precluded under Richardson-Merrell Inc. v. Koller, supra, 472 U.S. 424, where it was held that an order disqualifying counsel in a civil case was not appealable as a collateral order under the Cohen doctrine. Such an order was not completely separate from the merits and was not unreviewable on appeal from the final judgment, citing, inter alia, Flanagan v. United States, 465 U.S. 259 (1984), holding that disqualification of counsel in a criminal case was not immediately appealable and could be adequately reviewed on appeal of a final judgment. An order disqualifying counsel in a civil case is usually entwined with the merits of the litigation. Richardson-

Merrell, Inc. v. Koller, supra, 472 U.S. at 439. The disqualified attorney's interest in immediate vindication is not one that necessarily coincides with the interests of the client. Furthermore, review under the 28 U.S.C. § 1292(b) certification procedure may be available to the client, who can also raise the issue of disqualification on appeal from an unsatisfactory final judgment. Id. 472 U.S. at 435. To allow such an interlocutory appeal would undermine the statutory preference for a single appeal, raising all issues following final judgment on the merits rather than resorting to piecemeal appellate review. That final judgment rule, generally requiring that appeals be from final judgments, "promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment.(citation omitted) Immediate review of every trial court ruling, while permitting prompt correction of erroneous decisions, would impose unreasonable disruption, delay and expense. It would also undermine the ability of district judges to supervise litigation." Id., 472 U.S. at 430.

The plaintiff parents' claims that the order infringes on their parental rights also has no bearing on the appealability of the orders. Under the Cohen doctrine, a collateral order is appealable only if it conclusively determines the disputed issue which is separate from the merits. Swint v. Chambers County Commission, supra, 115 S.Ct. at 1208: an order denying summary judgment to a government entity on the ground that a particular employee whose actions were challenged may have been a final policy maker capable of binding the government entity under Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), which ruling the District Court

indicated would be reconsidered prior to submission of the case to the jury, was tentative, informal and incomplete, and was not subject to interlocutory, collateral appeal; Gulfstream Aerospace Corp. v. Mayacamas Corp., supra, 485 U.S. at 277-278: denial of an abstention motion was not subject to interlocutory appeal. The order did not conclusively determine the question of whether abstention was warranted based on the existence of an ongoing parallel state court proceeding, since the court's view could change as the two proceedings progressed.

The instant orders did not even appoint a guardian ad litem for the children for all further proceedings or disqualify the firm of Lansner & Kubitschek from representation of either the children or the parents. The orders simply appointed a guardian ad litem to question the children to determine if there was significant potential for a conflict of interest between the parents and children so that the children should have separate counsel, a guardian ad litem for all purposes in the proceeding, or both. Only if one accepts the parents' unreasonable position that the mere appointment of a guardian ad litem simply to question the children is a major infringement of their parental rights can these orders be regarded as conclusively determining any issue.

The District Court's order appointing a guardian ad litem for the limited purpose of questioning the minor children to determine if there was a potential conflict between the interests of the parents and children was not "big brother interference", nor is "Petitioners' wish to keep bureaucratic interference out of Petitioners' home". (Petition for Writ of Certiorari, p. 7), even rationally involved here. The District Court's order has no bearing

on the upbringing of petitioners' children, but is designed to regulate proceedings before the Court in an action for money damages and injunctive relief initiated by the plaintiff parents. The District Court's order appointing a guardian ad litem to question the children to determine if there was a potential for conflict between their interests and their parents' interests was authorized under Rule 17(c) Fed.R.Civ.P., and was an appropriate discretionary act under these circumstances. The courts have consistently recognized that they have inherent power to appoint a guardian ad litem under Rule 17(c) Fed.R.Civ.P. when it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent. For example, the court could appoint a guardian ad litem for a minor child when a question of how to apportion settlement proceeds of a car accident in which both parent and child were injured created a potential conflict of interest. Hoffert v. General Motors Corp., supra, 656 F.2d at 164. In a case where a minor sued claiming a right to obtain contraceptives without parental consent, there was a potential conflict between the interests of the parents and the child, and the parents could not serve as guardians ad litem in such litigation. M.S. v. Wermers, 557 F.2d 170, 175 (8th Cir. 1977); Accord: Noe v. True, 507 F.2d 9 (6th Cir. 1974). Rule 17(c), which is permissive and not mandatory, gives a federal court the power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant. Ad Hoc Committee of Concerned Teachers v. Greenburgh No. 11 Union Free School District, supra, 873 F.2d at 29, citing 6 C. Wright & A. Miller, *Federal Practice and Procedure*: *Civil* § 1570; 3A J. Moore & J.

Lucas, *Moore's Federal Practice*, § 17.26 (2d Ed. 1987). Furthermore, a decision by a District Court to appoint a guardian ad litem can be reversed on appeal only if the appointment constituted an abuse of discretion. Gardner v. Parson, 874 F.2d 131, 140 (3d Cir. 1989); Hoffert v. General Motors Corp., supra, 656 F.2d at 164.

Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court. Garrick v. Weaver, 888 F.2d 687, 693 (10th Cir. 1989). "[W]hen the complaint shows a conflict of interest between a general guardian and an infant the Court should, *on its own motion*, determine whether the infant's interests are adequately protected by the general guardian's representation." Chrissy F. v. Mississippi Department of Public Welfare, 883 F.2d 25, 27 (5th Cir. 1989), citing Adelman v. Graves, 747 F.2d 986, 988 (5th Cir. 1984). A guardian ad litem assists the court in carrying out that mission. As stated in Dupont v. Southern National Bank of Texas, 771 F.2d 874, 882 (5th Cir. 1985) *cert. den.* 474 U.S. 1085 (1988):

> The roles of a guardian ad litem and an attorney ad litem differ, and we must consider each separately. A guardian ad litem is, in a sense, an officer of the court. "[He] is not simply counsel to one party in the litigation, but instead plays a hybrid role, advising one or more parties as well as the court." *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 854 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982); (citations omitted). As one court explained, "[T]he infant is always the ward of every court

> wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done him. The guardian ad litem is appointed merely to aid and to enable the court to perform that duty of protection." *Richardson v. Tyson,* 110 Wis. 572, 86 N.W. 250, 251 (1901), *quoted in Friends for All Children,* 725 F.2d at 1400. An attorney ad litem, in contrast, serves no special function. He performs the same services as any attorney--giving advice, doing research, and conducting litigation--only for a minor child rather than for an adult.

Appointment of a guardian ad litem, simply to question the children, simply to assist the court in determining whether a potential conflict existed between the children and their parents, was certainly warranted when the underlying allegations of the complaint concerned the right to investigate a complaint that the parents abused or neglected the children. See Gardner v. Parson, supra, 874 F.2d at 139; Chrissy F. v. Mississippi Department of Public Welfare, supra, 883 F.2d at 27; Smith v. Organization of Foster Families, 431 U.S. 816, 841 n. 44 (1976): In a case challenging the constitutionality of procedures for terminating foster care placements with particular foster parents, "the District Court properly appointed independent counsel to represent the foster children so that the court could have the benefit of an independent advocate for the welfare of the children, unprejudiced by the possibly conflicting interests and desires of the other parties."

In this case, the District Court appropriately recognized its responsibility to protect infants before the court to determine that no injustice is done to them, as would occur if the parents recovered money damages because an investigation into the welfare of the children was conducted when that investigation was warranted. The parents would be rewarded for inappropriately resisting appropriate efforts to assist the children and indeed would only be encouraged to further mistreat them. The District Court appropriately rejected the unconscionable argument in opposition to the appointment that merely because the investigation into child abuse and neglect had been concluded, the only issue was an entitlement to money damages. It is the legal entitlement to conduct the investigation which is at issue, not the outcome; furthermore, the District Court even noted that the record before the court supported an inference that the investigation may have been prematurely and inadequately concluded because of undue solicitousness to the parents' complaints about the investigation. There is an obvious possibility of conflict in a suit in which children join their parents as plaintiffs challenging at least the implementation of statutory procedures to protect children from mistreatment by their parents. In addition, the plaintiffs purport to be representatives of classes of parents and children similarly affected by such child protection laws (JA 15). The District Court certainly was warranted in questioning whether potential conflict existed between the instant plaintiff parents and children.[3]

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[3] Even when the Sixth Amendment right to counsel in a criminal proceeding is involved, the right to counsel of one's choice is not unlimited. There is no absolute right to

(continued...)

The District Court also correctly rejected the argument that it could be assumed that counsel chosen by the plaintiff parents would adequately protect the rights of the plaintiff minor children. There was obviously a potential conflict involved in the multiple representation of the parents and children, who had potentially conflicting interests, see Dunton v. County of Suffolk, 729 F.2d 903, 908-909 (2d Cir. 1984) mod. other grs. 748 F.2d 69 (1984) citing, at 729 F.2d 908, Canons 5 and 9 of the ABA Code of Professional Responsibility, and Ethical Consideration (EC) 5-15, particularly since the conflict could not be effectively explained to, nor waived by, these young, minor children. As stated in Fargnoli v. Faber, 105 AD2d 523, 524 (3rd Dept. 1984) *appeal dismissed* 65 NY2d 631 (1985), where a parent and children have possibly conflicting interests in litigation, "[p]arents may not ...

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[3] (...continued)
joint representation which creates a possible conflict of interest, because the courts have an important interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Wheat v. United States, 486 U.S. 153, 160 (1988). Of course, in this case, the District Court has not even disqualified counsel or appointed a guardian ad litem for all purposes in the proceeding, but has merely appointed a guardian ad litem for the limited purpose of questioning the children to determine if there is a potential conflict of interest between the parents and the children. There was no final determination as to whether a full purpose guardian ad litem should be appointed or as to whether counsel should be disqualified, thus there is no final determination by the District Court which is appealable even as a collateral order.

retain counsel for their children or become involved in the representation of their children because of the appearance or possibility of a conflict of interest or the likelihood that such interference will prevent the children's representation from being truly independent."

The very limited order of the District Court did not raise an important question of law, a prerequisite for collateral order review. See Banque Nordeurope v. Banker, 970 F.2d 1129, 1131-1132 (2d Cir. 1992). Shakur v. Malcolm, 525 F.2d 1144, 1147-1148 (2d Cir. 1975). The orders appointing a guardian ad litem merely to interview the children to determine potential for conflict between the interests of plaintiff parents and children, with further court action to abide by that determination, are unappealable interlocutory orders concerning the manner of conducting the litigation, best left to the unreviewable discretion of the district court. See Cullen v. New York State Civil Service Commission, 566 F.2d 846, 848 (2d Cir. 1979); Weight Watchers of Philadelphia, Inc. v. Weight Watchers International Inc., 455 F.2d 770, 774 (2d Cir. 1972). The Second Circuit correctly dismissed this appeal, and the petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: March 9, 1998
New York, N.Y.

Respectfully submitted,

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